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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 663.

CHARLES E. GAY, JR., Receiver of the Savannah and Atlanta Railway, *Plaintiff in Certiorari*,

v.

MAJOR RUFF, *Defendant in Certiorari*.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN CERTIORARI.

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Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR DEFENDANT IN CERTIORARI.

Opinions of the Court Below.

The District Court's opinion will be found on pages 11 to 16 of the Record and is reported in 3 Fed. Supplement 264.

The opinion of the Circuit Court of Appeals is found on pages 25 to 30 of the Record, and has not yet been reported.

Jurisdiction.

The jurisdiction of this Court to review the ruling of the Circuit Court of Appeals is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925. (Title 28 U. S. C. Sec. 347(a).)

It is challenged here by defendant in certiorari because of the provisions of the second section of the Judiciary Act of March 3, 1887, now codified in Title 28, U. S. C. Sec. 71.

Statement.

Ruff brought suit in the State Court of Warren County, Georgia, to recover damages from Gay, as receiver of the Savannah and Atlanta Railway, for the negligent homicide of the minor son of Ruff. The tort was inflicted by Gay and his agents while carrying on the business of the railway property of the Savannah and Atlanta Railway, a Georgia corporation which Gay was then operating as receiver, appointed under the general equity powers of the United States District Court for the Southern District of Georgia. (Record pp. 1-3.)

Thereupon and before pleading, Gay removed the cause to the United States Court for the Southern District of Georgia, on the sole ground that he was the receiver and officer of that Court and that the suit in the State Court against him as such receiver was for and on account of acts done by him under color of his office and as such receiver and officer of the Federal Court. (Record pp. 5-7.)

Thereupon Ruff moved to remand said cause to the State Court upon the grounds, briefly stated, that the receiver was not an officer of the Court of the United States within the purview and true intent of the Act of August 23, 1916, amending Section 33 of the Judicial Code, and that the suit was not a civil action brought against the receiver "for and on account of any act done under color of his office or in the performance of his duties as such officer," within the purview of said Act of August 23, 1916, and because the

suit removed was brought against such receiver "in respect to acts and transactions of his in carrying on the business connected with such property," and was therefore properly brought in the State Court within the purview and true intent of Section 71 of Title 28 U. S. C. and is therefore not removable; for all of the above reasons, the Disfrict Court had no power to remove said suit from the State Court and no jurisdiction to hear and determine the same. (Record pp. 5-7.)

This motion was overruled by the District Court (Rec. pp. 11-16) and the cause itself was subsequently dismissed in that Court. (Rec. p. 17.)

Ruff then prosecuted an appeal to review these rulings to the Circuit Court of Appeals of the United States for the Fifth Circuit. (Rec. pp. 17-24.)

Upon appeal the Circuit Court of Appeals reversed the judgment of the District Court and directed that the dismissal be set aside and the cause remanded to the State Court. (R. p. 30.)

Questions Presented.

There are three questions presented by this case:

First, whether the present certiorari law as codified in Title 28 U. S. C. Sec. 347(a), and particularly the Act of February 13, 1925, permits this Court to review by writ of certiorari the decision of a Circuit Court of Appeals of the United States granting the remand of a cause to the State Court from which it has been removed, or whether such review is prohibited by the second section of the Judiciary Act of March 3, 1887, now codified in Title 28 U. S. C. Sec. 71.

Second, whether the petitioner, as receiver of the Federal Court, appointed under its general equity powers, diversity of citizenship and all other federal questions being absent, has the right to remove from a State Court a tort action against him as such receiver, such action growing out of his

operation as such receiver of a railway property; or whether such removal of an ordinary tort action is forbidden by the third section of the Act of March 3, 1887, now codified in Title 28 U. S. C. Sec. 125.

Third, implicit in both of the above propositions is the question whether prior statutes relating to a particular class of cases are repealed, by implication, by subsequent general statutes containing no repealing clauses and making no reference to such prior statutes, but broad enough in terms to cover them; or whether such prior statutes remain in force as exceptions to the later and more general statutes.

Argument.

I.

The jurisdiction of this court to review an order of remand to the state court.

We renew our challenge to the jurisdiction of this Court to review an order of the Circuit Court of Appeals of the United States remanding a cause to the State Court from which it had been removed.

Prior to the Judiciary Act of March 3, 1875, an order of a Circuit (now District) Court of the United States remanding a cause to the State Court from which it had been removed could not be reviewed in this Court on appeal or writ of error because it was not a "final judgment" of the Court below.

Chicago & Alton R. R. Co. v. Wiswall, 23 Wall. 509.

By the Act of March 3, 1875, however, express provision was made for the review by appeal or writ of error of such an order of remand.

18 Stat. 470.

By the Judiciary Act of March 3, 1887, as corrected by the Act of August 13, 1888, it was provided:

> "Whenever any cause shall be removed from any State Court into any Circuit Court of the United States and the Circuit Court shall decide that the cause was improperly removed and order it to be remanded to the State Court from whence it came, such remand shall be immediately carried into execution and there shall be no appeal or writ of error from the decision of the Circuit Court."

This Act expressly repeals the Act of March 3, 1875, and with the single change that the word "district" is substituted for by the word "circuit" wherever the same occurs has been reenacted and codified both in the Judicial Code of 1911 and the United States Code of 1926.

> 24 Stat. 552.
> Title 28 U. S. C. Sec. 71.

Since the enactment of this statute, this Court has uniformly and repeatedly held that such an order of remand is final and conclusive and is not subject to review here in any manner, directly or indirectly.

> *Morey v. Lockhart*, 123 U. S. 56.
> *Richmond & Danville R. R. Co. v. Thouron*, 134 U. S. 45.
> *Guernsey v. County of Patrick*, 137 U. S. 601.
> *Ex Parte with Pennsylvania Co.*, 137 U. S. 451.
> *Birdseye v. Schaffer*, 140 U. S. 117.
> *Mo. Pac. Ruy. Co. v. Fitzgerald*, 160 U. S. 556.
> *Powers v. C. & O. R. R. Co.*, 169 U. S. 92.
> *McLaughlin Bros. v. Hallowell*, 228 U. S. 278, 286.
> *Pacific Livestock Co. v. Lewis*, 241 U. S. 440, 447.
> *Yankaus v. Feltenstein*, 244 U. S. 127.
> *In the Matter of Matthew Addy, etc. Corp.*, 256 U. S. 417.

Many of the above cases were confined to holding that the order of remand could not be reviewed here by appeal or

writ of error because it was not a "final judgment" of the Court below from which such an appeal or writ of error might be prosecuted to this Court.

In *Chicago & Alton Railroad Company*, 23 Wall. 507, this Court held that while it had no jurisdiction to review an order of remand by writ of error, because the order of remand was not a "final judgment" of the Court below, the writ of mandamus could be employed to require the Court below to retain jurisdiction of a cause that it ordered remanded to the State Court, where the right of removal was undoubted.

After the passage of the Act of March 3, 1887, containing the provision that such remand shall be immediately carried into execution, this Court gave repeated expression to the opinion that it had no jurisdiction to review, in any way, the granting of a remand to the State Court by any of the lower federal courts.

In the case of *Morey v. Lockhart*, decided less than eight months after the passage of the Act of March 3, 1887, Mr. Chief Justice Waite, speaking for the Court, after quoting the Act, used this expression:

> "It is difficult to see what more could be done to make the action of the Circuit Court final, for all the purposes of the removal, *and not the subject of review in this court.*" (Italics mine.)
>
> *Morey v. Lockhart*, 123 U. S. 56, 58.

In the same case and on the same page, Chief Justice Waite effectually disposed of another contention made in behalf of the plaintiff in certiorari in this case, when he said:

> "It is contended, however, that the prohibitions against appeals and writs of error in the Act of 1887 apply only to removals on account of prejudice or local influence, but that cannot be so. The section of the statute in which the provision occurs has relation to removals generally, those for prejudice or local in-

fluence as well as those for other causes, and the prohibition has no words of limitation. It is in effect that no appeal or writ of error shall be allowed from an order to remand in 'any cause' removed 'from any state court into any Circuit Court of the United States.' The fact that it is found at the end of the section, and immediately after the provision for removals on account of prejudice or local influence, has, to our minds, no special significance. Its language is broad enough to cover all cases, and such was evidently the purpose of Congress."

Morey v. Lockhart, 123 U. S. 56, 58.

In *Powers v. Chesapeake & Ohio Railroad Company*, this Court held that an order of remand to the State Court "is not reviewable" by this Court.

Powers v. Chesapeake & Ohio R. R. Co., 169 U. S. 92, 98.

In the *McLaughlin* case, it was held that an order of the United States Circuit Court remanding a case to a State Court is not reviewable here, directly or indirectly.

McLaughlin Bros. v. Hallowell, 228 U. S. 278.

Prior to the enactment of the statute of March 3, 1887, containing in its second section the requirement that an order of remand to a State Court "shall be immediately carried into execution," this Court more than once held that the writ of mandamus could be employed to require a Court to retain jurisdiction of a cause removed from the State Court and ordered remanded to that Court, although under the statute neither appeal nor writ of error could be entertained to review such a ruling.

This was decided in *Chicago & Alton Railroad Co. v. Wiswall*, cited *supra*; and in the cases referred to in that case.

Subsequent to the passage of the Act of March 3, 1887, however, it was decided that while that Act abrogated *in terms* only an appeal and writ of error to review orders

of remand to the State Court, yet the language in the statute "such remand shall be immediately carried into execution" operated to prohibit the use of the writ of mandamus to require the lower court to retain jurisdiction of the cause.

In re Pennsylvania Co., 137 U. S. 451.

Later, in the case of *Mo. Pacific R. R. Co. v. Fitzgerald*, this Court, after reviewing the prior cases said:

> "We see no reason for reconsidering these conclusions and it may be regarded as settled that an order of the circuit court remanding a cause cannot be reviewed in this court by any direct proceedings for that purpose."
>
> *Missouri Pacific R. Co. v. Fitzgerald*, 160 U. S. 556, 582.

In the *Matthew Addy* case, which was an attempt to employ the writ of mandamus to require the Court below to vacate an order improperly remanding a cause to the State Court, this Court held that the use of the writ of mandamus was not permitted on account of the provision in the Act of March 3, 1887, that "such remand shall be immediately carried into execution" and after citing approvingly all of the cases heretofore referred to in this case, remarked:

> "It is obvious that this statute, and these decisions interpreting it, rule the case at bar, and require that the petition for mandamus be dismissed."
>
> *Matthew Addy Steamship & Commerce Corp.*, 256 U. S. 417, 420.

The contention has been advanced that the second section of the Act of March 3, 1875, in terms relates to orders of the District Court and not judgments of the Circuit Courts of Appeal: that the District Court has not decided that this cause should be remanded and no order of remand has been entered there, the Circuit Court of Appeals having merely directed that such an order be entered. That precise contention has been ruled by this court adversely.

In the case of *German National Bank v. Speckert*, it was held that a decision of the Circuit Court of Appeals reversing a decree of the District Court which denied a motion to remand a case to the State Court and ordering the District Court to remand the case, occupies the same status as if the order to remand had been granted in the District Court.

German National Bank v. Speckert, 181 U. S. 405.

In that case, Mr. Justice Gray quotes approvingly the opinion of Mr. Justice Bradley *In Re Pennsylvania Company, supra*, to the effect that the words in the statute "such remand shall be immediately carried into execution" are strongly indicative of an intent on the part of Congress "to suppress further prolongation of the controversy by whatever process".

Ibid, page 408.

On the precise point as to the applicability of the statute to a decision of the Circuit Court of Appeals reversing the District Court for failure to remand a cause, Mr. Justice Gray said:

> "In the present case the remand to the State Court was denied by the Circuit (now District) Court but, on appeal from its decree dismissing the bill, was ordered by the Circuit Court of Appeals.
>
> "If the Circuit (District) Court had ordered the case to be remanded, its order could not, according to the decisions above cited, have been reviewed by this court, in any manner, either by appeal from that court, or by mandamus to that court, or by writ of error to the state court.
>
> "It would be an extraordinary result if, while an order of remand by the circuit court, of its own motion, is not subject to review in any form, an order of remand by that court, by direction of the circuit court of appeals, were subject to a further appeal to this court."

Ibid, page 409.

The Present Certiorari Law.

The power of this court to grant the writ of certiorari is claimed under the Act of February 13, 1925. So far as that statute relates to the grant of the writ of certiorari in cases pending in the Circuit Courts of Appeal, it reads as follows:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."
>
> 43 Stat. 938; Title 28 U. S. C. Sec. 347(a).

Prior to the Act of March 3, 1891, the use of the writ of certiorari by this Court, had been mainly confined to its employment for diminution of the record to bring up proceedings or records from the lower court in order to aid in determining causes pending here. It was not of enough importance to be expressly mentioned in the general Judiciary Act of 1789 but by the Judiciary Act of March 3, 1891 (26 Stat. 828), it was provided that it should be competent for the Supreme Court to require, by certiorari or otherwise, upon the petition of a party thereto, the certification to that Court of any cause, civil or criminal, in which the judgment of the Circuit Court of Appeals was "made final" by statute,—that is cases in which the jurisdiction of the federal court was dependent entirely upon diversity of citizenship, and cases arising under the patent, revenue and criminal law, and admiralty cases. (26 Stat. 826.) This provision was reenacted as Section 240 of the Judicial Code of 1911, and by the Act of February 13, 1925, cited *supra*, it was amended to read as it now stands and as it has been quoted *supra*.

One of the primary purposes of the Act of February 13, 1925, was to make the decision of the Circuit Courts of Appeal final generally and in all cases except those in which Congress had expressly provided for appeal to the Supreme Court. Its purpose was to contract and not to expand the jurisdiction of this Court, to relieve it from an ever increasing burden of business and not to aggravate and increase that burden.

> Appellate Jurisdiction of the Supreme Court under the Act of February 13, 1925. (By Chief Justice Taft) 35 Yale Law Journal 1 and 2; Testimony of Mr. Justice Van Devanter and Mr. Justice McReynolds in the hearing before the sub-committee of the Committee on the Judiciary of the United States Senate, February 2, 1924, First Session of the 68th Congress, Senate Document No. 94446, p. 27.

Under the circumstances, the contention that the effect of this Act was to confer jurisdiction upon this Court to review cases in any instance where the right of review was expressly denied by statute is unreasonable.

The Act of February 13, 1925, contains no repealing clause. There is no reference whatever in it to the provisions of the Judiciary Act of March 3, 1887. If it repeals that Act, it must do so by implication.

Repeals by implication are never favored. The rule against such repeal is strong and especially applicable where the prior law is a special act such as one relating to the removal of causes from the State to the Federal Courts and the remand of such causes back to the State Courts, and the subsequent law is general in its terms and operation. The fact that one statute is special and the other general creates a presumption that the special is to remain as an exception to the general and repeal by implication in such a case only results when the implication to that end is irresistible.

This particular phase of the argument will be amplified and supported by authority in the concluding section of this brief.

II.

Removability of the cause.

By the Act of March 3, 1887, Section 3, it is provided:

> "Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice."
>
> Title 28 U. S. C. A., Section 125.

After considerable diversity of opinion in the several district and circuit courts of the United States, the Supreme Court of the United States finally held (1900) that a suit brought in a state court under its terms was not removable to the Federal Court either as a suit arising under the Constitution and laws of the United States or because the receiver in such case was one appointed by a court of the United States.

> *Gableman v. Peoria Railway Company*, 179 U. S. 335 (45 L. Ed. 220).

It is interesting to note in this connection that in the dissenting opinion of Mr. Justice Brandeis, in *Barnette v. Wells Fargo Nevada National Bank*, Note 7, there is given an interesting account of this diversity of decision in the lower federal courts on this question and of the final solution of these differences that is found in the case of *Gableman v. Peoria Railway Company, supra*. This opinion was rendered on March 15, 1926.

> *Barnette v. Wells Fargo Nevada National Bank*, 270 U. S. 438, 451, Note 7.

It seems to us that the *Gableman* case definitely and finally settled the question of removability of cases brought under the permission contained in the third section of the Act of March 3, 1887. Such was evidently the opinion of Mr. Justice Brandeis *as late as March 15, 1926:*

The *Gableman* case has been cited approvingly in the following cases decided since the passage of the Act of August 23, 1916, amending Section 33 of the Judicial Code:

American Brake Shoe and Foundry Co. v. Railway Company (1920), 263 F. 237-240.
Luhrig Collieries Co. v. International Coal & Dock Co. (1921), 281 F. 271.
Toledo Fence & Post Co. v. Lyons (1923), 290 Fed. 637-643.
Walters v. Payne (1923), 292 F. 124-127.
Field v. Kansas City Refining Co. (1924), 296 F. 800-806.
Ford Motor Co. v. Auto Insurance Co. (1926), 13 F. (2d) 415-417.

It cannot be seriously questioned that under the Act of March 3, 1887, third section, as construed in the *Gableman* case, the case at bar was not removable from the state Court into the Federal District Court since there was no diversity of citizenship or any other ground of federal jurisdiction, and the sole claim for removal was that the defendant was a receiver of a state corporation appointed by the Federal Court in the exercise of its general equity powers. This must be true unless the law as to removal of this character of cases has been changed by the Act of August 23, 1916, amending Section 33 of the Judicial Code.

Section 33 of the Judicial Code as amended by the Act of 1916.

Section 33 of the Judicial Code of the United States, providing for the removal of civil and criminal cases by officers of the Government engaged in the collection of its revenue where such cases relate to acts done by such offi-

cers under the color of their office or in the performance of their duties, was amended in 1916 so as to include "any officer of the Courts of the United States on account of any act done under color of his office or in the performance of his duty as such officer."

39 Stat. 532.
Title 28 U. S. C. A., Section 76.

It is to be observed that the protection afforded to revenue officers under the above section is different from that extended by the Act of 1916 to the "officers" of the Federal Court.

The protection extended to revenue officers and persons acting under their authority was "on account of any act done under color of his office or of any such law, *or on account of any right, title, or authority claimed by such officer or other person under any such law, or if commenced against any person holding property or estate by title derived from any such officer and affects the validity of any such revenue law*" (italics mine), whereas the protection extended to officers of the Federal Court is simply against civil or criminal actions "for or on account of any act done under color of his office or in performance of his duty as such officer." The protection to the res given to revenue officers is not extended to Court officers.

It has, however, been repeatedly ruled that actions against a receiver are in law actions against the receivership and that the contract, misfeasances, negligences, and liabilities involved in such a case are not personal and the judgments recovered against him as such receiver are payable only out of the funds in his hands as receiver.

Texas & Pacific R. R. Co. v. Cox, 145 U. S. 593, 603.
McNulta v. Lockridge, 141 U. S. 331, 332.

In the case at bar, no attempt was made to hold the receiver responsible as an individual for any act done under

color of his office or in performance of his duty as an officer." On the contrary, the case at bar merely seeks to charge the property in the hands of the receiver with liability on account of the negligence of the receiver and his agents in conducting the business connected with such property, subject, of course, to the general equity jurisdiction of the Federal Court appointing the receiver as to the payment and priority of whatever judgment might be recovered in the suit.

Since the Act of 1916, amending Section 33 of the Judicial Code, a district court in New York, two or three district courts in the 8th Circuit and the Circuit Court of Appeals of the Eighth Circuit have held that the Act of 1916 necessarily repealed the third section of the Act of 1887, as the latter Act was construed by the Supreme Court in the Gableman case, *supra*, and authorizes the removal from the state courts to the Federal Courts of tort actions against the receivers of railroad properties appointed by the federal courts, even where the actions in question were "in respect to the acts or transactions of the receiver in carrying on the business" connected with the railroad property of which he was receiver.

Mallaroza v. Hustis, 266 F. 882.
Newell v. Byram, 18 F. (2d) 657.
Berens v. Byram, 26 F. (2d) 953.
Newell v. Byram, 26 F. (2d) 200.

Exactly to the contrary of the above decisions are the following cases:

Slover v. Chicago R. R., 16 F. (2d) 609.
Knapp v. Byram, 21 F. (2d) 226.
Hartman v. Fleming (Mo.) 264 S. W. 873 (2d), 874.

There are two cases in which the Federal District Judges in the 8th Circuit have held that the amendment of 1916 to Section 33 of the Judicial Code also repeals by implication the inconsistent provisions of the Federal Employers

Liability Act, forbidding removal from a state to a federal court of any case arising under that Act.

Bevins v. Buram, 26 F. (2d) 953.
Elliott v. Wheelock, 34 F. (2d) 213.

It is to be observed that as to the last of these decisions, District Judge Reeves, who rendered it, admittedly does so because he felt constrained to follow the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Newell v. Buram*, 26 F. (2d) 200, although his individual opinion and judgment were contrary to that view of the matter.

In 1927, three judges of the District Court of Minnesota held that the provisions in the Employers Liability Act against removal was *not* repealed by implication by the amendment of 1916 to Section 33 of the Judicial Code.

Knapp v. Buram, 21 F. (2d) 226.

The decision last cited was rendered by three district judges in Minnesota, Messrs. Kant? Molyneux, and Sanborn. It is worthy of note that Judge Molyneux concurred with the other judges with respect to the non removability of employers liability cases, although he had previously taken exactly the opposite view and had refused to follow the opinion of Judge Reeves in the *Slover* case.

The opinion in the case of *Knapp v. Buram*, cited *supra*, is an exceedingly able one. It is much more comprehensive and much stronger, in the opinion of counsel for respondent, than the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Newell v. Buram*, 26 F. (2d) 200, or than any of the other opinions of the several district courts maintaining that cases of this character were removable, including the District Court of the Northern District of New York. The question at issue is exactly the same in the Employers Liability cases as it is in cases other than Employers Liability cases brought against Federal

receivers under the Act of 1887, because while the prohibition against removal is plainly expressed in the statute in the Employers Liability cases, it is equally plainly written into the statute, by construction of the Supreme Court in the *Gahagan* case, as to all cases against Federal receivers coming within the terms of the Act of 1887.

The Barnette case.

It is strongly contended by counsel for plaintiff in certiorari that the *Barnette* case sustains the ruling of the Circuit Court of Appeals for the 8th Circuit and is in conflict with the ruling of the Circuit Court of Appeals for the Fifth Circuit in the case at bar. The *Barnette* case was a suit to recover lands in the possession of the receiver of a corporation of Alaska created by the laws of Congress and in the hands of a receiver appointed by the Federal Court. The Court held that such a case was removable to the Federal Court under Section 28 of the Judicial Code as well as Section 33 of that Code.

> *Barnette v. Wells Fargo Nevada National Bank*, 270 U. S. 438 (1).

It was probably removable to the Federal Court under Section 28 of the Judicial Code because it was brought against the receiver of a corporation chartered by Congress.

> *Texas & Pacific R. R. Co. v. Cox*, 145 U. S. 593.
> *Bankers Trust Co. v. Texas & Pacific R. R. Co.*, 241 U. S. 295. (4).

It is to be remembered also that the *Barnette* case was a suit against a bank and not against a railroad and therefore the fifth section of the Act of January 28, 1915, declaring "no court of the United States shall have jurisdiction of any action or suit by or against any railroad company upon the ground that such railroad company was in-

corporated under an Act of Congress" has no application to the *Barnette* case.

38 Stat. (Part 1) p. 804.

Besides in the *Barnette* case it was sought to recover property in the hands of the receiver of the Federal Court and that Court has exclusive jurisdiction of all efforts to accomplish such a purpose.

Lion Bonding Co. v. Karatz, 262 U. S. 77, 89.
Field v. Kansas City Refining Co., 296 F. 800, 804, 806.

In the last case cited, the Court said:

"Gableman v. Peoria R. R. Co., 179 U. S. 335, is cited and relied on by appellant. There the party claimed to have been injured by failure of defendant company to properly operate gates at the crossing. *The claim* did not in any way *involve the question* of *possession or right* of title to property in *the possession of receiver.*" (*Italics mine*)
Ibid, p. 806.

In the *Barnette* case, the controversy between the majority and minority of the Court related entirely to whether or not the presumption that the cause had been properly removed could be indulged in here, since there was no challenge either in this Court or in the Circuit Court of Appeals of the right to removal.

Barnette v. Wells Fargo Nevada National Bank, 270 U. S. 438, 441.

Mr. Justice Stone, speaking for the Court, said:

"The jurisdiction of the District Court was not challenged in the Circuit Court of Appeals nor is it challenged here."
Ibid, p. 440.

For these reasons we submit that the Court did not rule anything on this subject in the *Barnette* case, except that where the right to remove the case from a State Court to a District Court is not challenged at any stage of the proceedings, this Court would presume that the removal was rightful.

Does the Act of 1916 repeal by implication the Act of 1887?

The construction of the Act of 1916 adopted by the Circuit Court of Appeals for the 8th Circuit in the case of *Newell v. Byram*, 26 F. (2d) 200, involves the theory that necessarily the Act of March 3, 1887, Section 3, is repealed by implication by the Act of August 23, 1916. The construction adopted by the Circuit Court of Appeals for the 5th Circuit in the case at bar reconciles the two statutes and construes them together. The Act of 1916 contains no repealing clause, it does not in any way refer to the Act of 1887 and if it repeals that Act, or modifies it in any respect, it must do so by implication. To effect such a repeal, judicial construction is required and in such cases the attempt is to discover and declare the legislative intent.

It must be remembered that when the Act of August 23, 1916, was passed, it had been for almost thirty years the settled policy of the Government that suits against receivers appointed by the Federal Courts of the character of the case at bar should be tried in the State Courts and not removed to the Federal Courts and it was not the purpose or object of the Act of August 23, 1916, to change that policy.

As pointed out in the opinion of the Circuit Court of Appeals for the 5th Circuit in the case at bar, the report of the House Committee on the Bill that subsequently became the statute of August 23, 1916, contains the following expressions:

> "The statute, with the proposed amendment, does (fol. 43) not extend in any degree the jurisdiction or

> the powers of the courts of the United States. It merely provides a more orderly method of procedure which enures as much, in fact more, to the benefit of the states than to the benefit of the United States, because it substitutes for the writ of habeas corpus the right of removal; so that instead of a summary discharge under the habeas corpus proceedings the amendment provides for a trial before a court and jury.
>
> It will be observed, therefore, that the effect of the proposed amendment does not increase or enlarge the jurisdiction of the Federal Courts, and is confined solely to giving to the officers of the Federal courts, in case of prosecution in their official capacity, a regular and orderly right of removal from the State to the Federal courts, instead of compelling such officers to resort to the present remedy by writ of habeas corpus, which would require the officer to go into custody in order to obtain the writ."

The construction of the Act of August 23, 1916, by the Circuit Court of Appeals for the 8th Circuit in *Newell v. Bjoram*, *supra*, necessarily repeals by implication the Act of March 3, 1887, Section 3, and such will be the result unless the very reasonable construction placed on the former statute by the Circuit Court of Appeals for the 5th Circuit in the case at bar is sustained, or unless this Court shall determine, it seems to counsel entirely reasonable and proper, that in view of the existence of the Act of 1887 and the declared purpose of the Act of 1916, the effect of the latter Act was to afford the protection stated therein to "any officer" of the Courts of the United States who is employed and paid by the Government for his services and who regularly assists the Court in the administration of its general business, and does not include receivers, masters, attorneys or other persons appointed by the Court to assist in its administration of particular and special cases.

We believe that that is exactly what is meant by Congress by the Act of 1916. We respectfully urge that such a view of the matter is more reasonable than the proposition urged

in opposition thereto in the contention "it can be only said that the author of the report, in declaring the proposed amendment 'does not extend in any degree the jurisdiction or powers of the Courts of the United States' to some extent failed to foresee or may have deliberately failed to state the result of giving effect to the purpose so clearly expressed."

In the concluding section of this brief, we shall discuss the proper construction of apparently conflicting statutes so as to avoid repeal by implication and we hope to establish the contention that while the word "officer" in its broadest sense technically may embrace "receiver" and "manager", it does not necessarily do so and that it must be remembered that in the construction of statutes "words are sometimes employed with less than their largest literal meaning," (*Great Northern Railway Co. v. U. S.*, 155 Fed. 945, 961), and that the Congress could not have meant in this instance to have included "receivers" and "managers" in the word "officers" as employed in the Act of 1916, because Congress will be conclusively presumed to have known that a different rule had been prescribed by the Act of 1887 for "Receivers" and "managers."

III.

Repeal of statutes by implication.

Repeal by implication is never favored. It results only when there is positive repugnancy and irreconcilable difference between the two statutes. It cannot result where it is possible, by any reasonable construction, to allow both statutes to stand.

To effect a repeal by implication, judicial construction is necessary and in such cases the attempt is to discover and declare the legislative intent. The rule against repeal by implication is especially strong and especially applicable, where the prior law relates to a particular subject or class

of cases and the subsequent law is general in its term and operation.

The above are, we submit, the canons of statutory interpretation adopted by this Court in numerous cases and uniformly applied.

In the *Wood* case, Mr. Justice Story, speaking for this court, said:

> "We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some or even all of the cases provided for by it: for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new law and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy. * * *"
>
> *Wood v. United States*, 16 Peters Star Page 363.

In the *McCool* case, Mr. Justice Swayne said:

> "If the plaintiff below can succeed in this action, it must be because the Act of 1857 impliedly repeals this provision as to this case. If there were no such statutory provision, the Act of 1857, being in derogation of the common law, would be construed strictly. 'A repeal by implication is not favored.' 'The leaning of the courts is against the doctrine, if it be possible to reconcile the two Acts of the Legislature together. Sedg. Stat. and Cons. Law, 127; Canal Co. v. R. R. Co., 4 Gill & J., 1; Bowen v. Lease, 5 Hill, 221; Williams v. Potter, 2 Barb., 316."
>
> *McCool v. Smith*, 1 Black 459, 471.

In *Townsend v. Little*, it was held where a prior act did not require attestation by witnesses of a deed by the mayor of lands included in a town site, it was not repealed by a subsequent general statute requiring *all* deeds to be attested by at least two witnesses. In that case, Mr. Justice Woods, speaking for the court, said:

> "* * * According to the well settled rule, that general and specific provisions, in apparent contradic-

tion, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the territory requiring deeds generally to be executed with two witnesses. Pease v. Whitney, 5 Mass., 380, Nichols v. Bertram, 3 Pick., 342; State v. Perrysburg, 14 Ohio St., 472; London, etc., Railway v. Wandsworth Board of Works, L. R. 8 C. P., 185; Bishop on the Written Laws, sec. 112 a.

Townsend v. Little, 109 U. S. 504, 512.

In the *Crow Dog* case, Mr. Justice Matthews said:

"It must be remembered that the question before us is whether the express letter of section 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed. If not, it is in force and applies to the present case. The Treaty of 1868 and the agreement and Act of Congress of 1877, it is admitted, do not repeal it by any express words. What we have said is sufficient at least to show that they do not work a repeal by necessary implication. A meaning can be given to the legislation in question, which the words will bear, which is not unreasonable, which is not inconsistent with its scope and apparent purposes, whereby the whole may be made to stand. Implied repeals are not favored. The implication must be necessary. There must be a positive repugnancy between the provisions of the new laws and those of the old. Wood v. U. S., 16 Pet., 342; Daviess v. Fairbairn, 3 How., 636; U. S. v. Tynen, 11 Wall., 88 (78 U. S. XX., 153); State v. Stoll, 17 Wall., 425 (84 U. S. XXI., 650).

"The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is, *Generalia specialibus non derogant*. 'The general principle to be applied,' said Bovill, C. J., in Thorpe v. Adams, L. R., 6 C. P., 135, 'To the construction of Acts of Parliament is that a

general Act is not to be construed to repeal a previous particular Act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two Acts standing together.' 'And the reason is,' said Wood, V. C., in Fitzgerald v. Champneys, 30 L. J. Ch., 782, 2 Johns. & H., 31-54, 'that the Legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do.''

Ex Parte: In the Matter of Kan-gi-shun-ca, Otherwise Known as Crow Dog, 109 U. S. [illegible]

In the *Chew Heong* case, Mr. Justice Harlan said:

"* * * In State v. Stoll, 17 Wall., 430 (84 U. S., XXI., 654), the language of the court was that 'It must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together, they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be.' See also Ex parte Crow Dog, 109 U. S., 570 (XXVII., 1035); Arthur v. Homer, 96 U. S., 140 (XXIV., 812); Harford v. U. S., 8 Cranch, 109."

Chew Heong v. U. S., 112 U. S. 536.

In the case of the *Church of the Holy Trinity*, it was held that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit and not within the intention of its makers and that in determining the question of intent the reports of the committees of the two houses of Congress may be considered.

Church of the Holy Trinity v. U. S., 143 U. S. 457.

In the *Frost* case, Mr. Justice Harlan said:

"* * * It is well settled that repeals by implication are not to be favored. And where two statutes

cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore, to displace the prior statute. McCool v. Smith, 66 U. S. 1 Black, 459, 468 (17: 218, 221); United States v. Tynen, 78 U. S. 11 Wall. 88, 93 (20: 153, 154); Red Rock v. Henry, 106 U. S. 596, 601 (27: 251, 253); United States v. Three Hundred and fifty-six Caddies of Tobacco, 78 U. S. 11 Wall. 652 (20: 235); King v. Cornell, 106 U. S. 395, 396 (27: 60).

Frost v. Wenie, 157 U. S. 46.

In the *Healey* case, it was held that the Act of 1887, fixing the price of all desert lands at $1.25 per acre, does not repeal a prior statute fixing the price of certain specified kinds of desert lands at $2.50 per acre. In that case, Mr. Justice Harlan said:

"'It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a later statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and therefore to displace the prior statute.'"

U. S. v. Healey, 160 U. S. 136, 147.

In the *Greathouse* case, it was held that the Tucker Act, fixing six years as the statute of limitations on all claims against the Government, did not repeal the proviso of a prior Act, excepting from the limitation all persons beyond

the seas and laboring under other disabilities. In that case, Mr. Justice Harlan said:

> "[. . . . .] Those exceptions were not expressly abrogated by the act of 1887, and they could be held to be repealed only by implication. But repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible, to both of them. Frost v. Wenie, 157 U. S. 46, 58 (39: 614, 619); United States v. Healey, 160 U. S. 136, 147 (40: 369, 373)."
>
> *U. S. v. Greathouse*, 166 U. S. 601, 605.

In the *Rodgers* case, Mr. Justice Brewer said:

> "It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general, the terms of the general broad enough to include the matter provided for in the special, the fact that the one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special. In Ex Parte Crow Dog, 109 U. S. 556, 570, sub nom. Re Kang-Gi-Shun-Ca, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396, 405, this court said:
>
> 'The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is generalia specialibus non derogant.' 'The general principle to be applied,' said Bovill, Ch. J., in Thorpe v. Adams, L. R. 6 C. P. 135, 'to the construction of acts of Parliament, is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the

> subject, or unless there is a necessary inconsistency in the two acts standing together." "And the reason is," said Wood, V. C., in Fitzgerald v. Champenys, 30 L. J. Ch. N. S. 782, 2 Johns. & H. 31-54, "that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do." ""
> *Rodgers v. U. S.*, 185 U. S. 83, 87, 88.

In the *Nix* case, this Court held that a general statute, fixing the compensation of all marshals throughout the United States, did not operate to repeal a prior special statute fixing a different rule in Oklahoma; in that case, Mr. Justice Brown said:

> "The rule of statutory construction is well settled that a general act is not to be construed as applying to cases covered by a prior special act upon the same subject. On this principle we held in Townsend v. Little, 109 U. S. 504, 27 L. ed. 1012, 3 Sup. Ct. Rep. 357, that special and general statutory provisions may subsist together, the former qualifying the latter. See also Churchill v. Crease, 5 Bing. 177; Magone v. King, 2 C. C. A. 383, 1 U. S. App. 267, 51 Fed. 525, and cases cited; State v. Clarke, 25 N. J. L. 54."
> *U. S. v. Nix*, 189 U. S. 199, 205.

In the *Binns* case, this Court held that it was entirely proper for the Court to examine reports of committees of either house of Congress, with a view to determining *the scope* of the statutes passed on the strength of such reports.

> *Binns v. U. S.*, 195 U. S. 486, 495.

In the *Petri* case, this Court held that the Judiciary Act of March 3, 1887, making general provisions for the Federal District Courts throughout the country, did not repeal a prior statute relating to Federal Districts in Illinois; in this case Mr. Justice White said:

"It is elementary that repeals by implication are not favored, and that a repeal will not be implied unless there be an irreconcilable conflict between the two statutes. And especially does this rule apply where the prior law is a special act relating to a particular case or subject, and the subsequent law is general in its operation."

Petri v. F. F. Creelman, 199 U. S. 487, 497.

In *Ex Parte United States*, Mr. Chief Justice White said:

"* * * When the issue is thus narrowed, solution is readily reached by the application of the elementary rule that a special and particular statutory provision affording a remedy for particular and specific cases is not repealed by a general law unless the repeal be express or the implication to that end be irresistible. Petri v. F. F. Creelman Lumber Co., 199 U. S. 487, 497, 50 L. ed. 281, 286, 26 Sup. Ct. Rep. 133. * * *"

Ex Parte United States, 226 U. S. 420, 424.

In *Washington v. Miller*, it was held that a later general statute did not repeal a prior special statute and Mr. Justice Van Devanter said:

"* * * In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (United States v. Healey, 160 U. S. 136, 146, 40 L. ed. 369, 373, 16 Sup. Ct. Rep. 247; United States v. Greathouse, 166 U. S. 601, 605, 41 L. ed. 1130, 1131, 17 Sup. Ct. Rep. 701); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (Townsend v. Little, 109 U. S. 504, 512, 27 L. ed. 1012, 1015, 3 Sup. Ct. Rep. 357; Ex parte Crow Dog (Ex parte Kang Gi

Shin Ca), 109 U. S. 556, 570, 27 L. ed. 1030, 1035, 3 Sup. Ct. Rep. 396; Rogers v. United States, 185 U. S. 83, 87-89, 46 L. ed. 816, 818, 819, 22 Sup. Ct. Rep. 582); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

Washington v. Miller, 235 U. S. 422, 428.

Mr. Justice Van Devanter, while on the Circuit bench, thus stated the rule in the *Great Northern R. R. Co. et al. v. U. S.* case:

"'To establish a supersession or repeal of a statute by implication, it is not sufficient to show merely that a later statute, making no mention of the particular subject matter of a prior one, employs language broad enough to cover some part or all of it; for as words are sometimes employed with less than their largest literal meaning, it must also appear that the two statutes can not stand together, reasonable purpose and operation being accorded to each. Particularly is this true if the prior statute expresses a settled policy in legislation.'"

Great Northern R. R. Co., et al. v. U. S., 155 Fed. 945, 960, 961.

Conclusion.

Tested by the foregoing canons of statutory construction, laid down by this Court, we respectfully insist:

First, that the certiorari act of February 13, 1925, while applying by its terms to "any case" pending in a Circuit Court of Appeals, does not repeal by implication the prior act of March 3, 1887, prohibiting the review of an order of remand to the State Court by the provision that "such remand shall be immediately carried into execution"; that the prior special statute, applicable to remands only, remains in force as an exception the later general act, applicable to "any case."

Second, that the Act of August 23, 1916, adding the words "or against any officer of the courts of the United States, for and on account of any act done under color of his office or in performance of his duty as such officer" does not repeal, by implication, the prior act of March 3, 1887, (section three) now codified in Title 28, Section 125 of the U. S. C., authorizing the bringing of certain suits against the "Receivers" or "Managers" of property, appointed by the courts of the United States, in the State courts.

The later act does not expressly repeal the prior act,—it makes no reference to it and contains no repealing clause. It can only repeal it by implication if such was the evident purpose of Congress, and the contrary is evident. It is to be presumed that when it enacted the law of 1916 Congress knew of the existence of the law of 1887, and since it did not expressly repeal it, intended that the prior statute should remain as an exception to the later and more general statute.

"If the two statutes can stand together, they must so stand." Any construction of the later statute that does not make it utterly meaningless is to be preferred to a construction that repeals the prior statute.

These two statutes can stand together (a) by giving to the act of 1916 the construction placed upon it by the Circuit Court of Appeals of the Fifth Circuit in the case at bar; (b) by construing the word "officer" in the Act of 1916 to mean only the officers of the Court appointed and paid by the government, and as not including "Receivers", who at best are officers of the Court in only a very general sense, as attorneys admitted to practice therein are officers, especially in view of the fact that the prior statute of 1887 had established a contrary rule as to the removal of causes by such receivers.

For all of these reasons, we submit, first, that the petition for certiorari should be dismissed by the Court, and sec-

ond, that the judgment of the Circuit Court of Appeals for the Fifth Circuit, in this case, should be affirmed.

Respectfully submitted,

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